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No. 07-714

In The

Supreme Court of the United States

ELIZABETH DEICH-KEIBLER and
LARRY K. HALER,

Petitioners,

versus

BANK ONE and RBC MORTGAGE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

PHILIP C. KIMBALL
Counsel for Petitioners
1970 Douglass Boulevard
Louisville, KY 40205
(502) 454-4479

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. May corporations buy and sell at-will employees without committing torts under Indiana law (restraint of trade and intentional interference with the employees' prospect of employment), one jurisprudential foundation of which is the Thirteenth Amendment to the Constitution of the United States?

Subsidiary Questions

a. Is the common-law tort of restraint of trade still viable under Indiana law?

b. May a United States Court of Appeals declare that an Indiana common-law tort is no longer viable where this argument had not previously appeared in the case and:

1). It is obviously wrong; and

2). The plaintiffs had no opportunity to respond to it other than through a petition for rehearing?

c. Are corporations ever justified in buying and selling at-will employees under Indiana tort law?

2. Has an employer violated 29 U.S.C. §1140 (ERISA) where its sale of one of its many "businesses" is arguably a sham transaction that saves it millions of dollars in severance benefits to the employees of the "business," whom it has sold along with its "business?"

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OPINIONS AND ORDERS BELOW

The District Court's Judgment dismissing Petitioners' claims (per Barker, D.J.), was entered on September 30, 2005. It appears at Page 34a of this Petition.

The District Court's Opinion in support of the above Judgment was entered on September 30, 2005. It appears at Pages 16a-33a of this Petition.

The District Court's Opinion and Order denying Petitioners' FRCP 59(e) motion to set aside the Judgment of September 30, 2005, was entered on September 19, 2006. It appears at Pages 35a-39a of this Petition.

The Order of the Court of Appeals affirming the opinions and orders of the District Court was rendered (per curiam) on June 26, 2007. It appears at Pages 1a-15a of this Petition.

The Order of the Court of Appeals denying the Petitioners' petition for a panel or an en banc rehearing was entered on August 27, 2007. It appears at Page 40a-41a of this Petition.

JURISDICTION OF THE COURT

The Order sought to be reviewed was entered on June 26, 2007. Reconsideration was denied on August 27, 2007.

Petitioners invoke the jurisdiction of this court under 28 United States Code §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Constitution of the United States, Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to its jurisdiction.

15 United States Code §1, Burns Indiana Statutes, §24-1-2-1

Every scheme, contract, or combination in restraint of trade or commerce, or to carry out restrictions in trade or commerce, is illegal.

29 United States Code §1140

It shall be unlawful of any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

STATEMENT OF THE CASE

Petitioners, Elizabeth Deich-Keibler and Larry Haler, began working for Respondent, Bank One, in 1988, and 1989, respectively.

The bank frequently abolished the jobs of Haler and Keibler and transferred them to new ones as its business interests shifted during the next fifteen years. Keibler and Haler enjoyed this career flexibility and were intensely loyal to Bank One (Record of the District Court, #35, Tab 3, Keibler Depo., P. 30-31, 173-174; Tab 4, Haler Depo., Pp. 15, 21, 33-40, 43, 61).

Bank One transferred Keibler and Haler into its wholesale mortgage (brokered) home equity business in 1998 and 1999, respectively.

Both Haler and Keibler shrugged off rumors circulating early in 2003 that Bank One would soon be leaving the brokered mortgage business. They believed that if this took place, Bank One would simply do with them what it had done in the past: transfer both of them into some other position within the bank. Failing that, they depended upon Bank One's generous severance benefits for employees who could not find comparable jobs within the bank under such circumstances.

Unbeknownst to Haler and Keibler, the bank's benefits plan had been amended in 2002 to abolish severance benefits if Bank One could find a "successor employer" for laid-off employees (Haler Depo., Pp. 102-103; Record of the District Court, #35, Motion for Summary Judgment, Exhibit 8).

Furthermore, the rumors about Bank One's exiting the brokered mortgage business turned out to be true. On May 27, 2003, it entered into a contract with Respondent RBC Mortgage Company to do this very thing.

The contract included the transfer and lease of certain of Bank One's assets to RBC so that, " . . . RBC could assume and continue the operations of [Bank One's] brokered real estate business," (Record of the District Court, Motion for Summary Judgment, #35, P. 34).

These assets were mostly intangible. Haler and Keibler and their co-workers worked out of their homes and cars. Bank One's brokered real estate business had no real or personal estate of any substance (Keibler Depo., P. 43).

Except for its employees.

And Bank One tried to sell these employees, including Haler and Keibler, to RBC as part of the parties' "Asset Purchase Agreement."

The language of the agreement recited that RBC would, " . . . acquire from Bank One some of the employees currently employed in Bank One's brokered real estate business," (Record of the District Court, #44, Exhibit C, P. 2; Appendix for the Court of Appeals, P. 47).

The Courts below described what happened next:

> As part of the deal, Bank One agreed with RBC to not employ or solicit any former division employees for a period of six months from the effective dates defined in the Agreement [June 15, 2003] (Opinion of the District Court, 9-30-05, P. 2; this Brief, P. 17a).
>
> . . .
>
> The Plaintiffs attempted to find other positions in Bank One, as they had when prior re-organizations by Bank One eliminated the positions they had occupied but were told that Bank One could not offer them employment under the sales agreement [with RBC Mortgage Company] (Opinion of the Court of Appeals, P. 2; this Brief, Pp. 1a-2a).

Of course, Bank One had to discharge Haler and Keibler from their positions of long-term employment, " . . . in connection with the sale of the division," (Opinion of the District Court, 9-30-05, P. 2; this Brief, P. 17a). It did so on June 15, 2003.

RBC did offer jobs to Haler and Keibler as part of its contract with Bank One.

The terms, conditions, privileges, and compensation of these jobs were far inferior to those that Haler and Keibler enjoyed in their positions with Bank One (Keibler Depo. 73-74, 111, 146-147; Haler Depo., Pp. 23-30, 44-45, 137-138).

Bank One pressured Haler and Keibler to go to work for RBC. It announced the sale on May 23, 2003

and told Haler and Keibler that they only had until June 16, 2003, to accept RBC's job offers – offers that RBC did not even formally extend to Keibler and Haler until June 10, 2007 (Haler Depo., Pp. 117, 121-125).

Keibler especially resisted this pressure. Indeed, she lobbied vigorously with Bank One to continue working for it. She had a unique $300,000 insurance trust with Bank One for her adult mentally retarded son and the trust was contingent upon her being an employee of the bank (Keibler Depo., Pp. 146-147).

Keibler's bosses not only resisted Keibler's lobbying efforts, but became abusive toward for engaging in it. One of them threw a spread sheet at her. Another screamed at her for questioning her impending discharge from Bank One's employment (*id.*, Pp. 79-81, 97). The problem, obviously, was that Bank One's efforts to sugarcoat the sale of its employees to RBC was doomed to fail. Finally, Sandy Simonson truthfully explained to Keibler why she could not continue to work for Bank One. Ms. Simonson told Keibler that, " . . . you now belong to RBC Bank, we have sold you," (*id.*, P. 174).

Haler and Keibler refused RBC's offers of inferior employment and requested severance benefits from Bank One, after it fired them on June 16, 2006. Bank one denied the applications of Haler and Keibler for this benefit citing the "successor employer" provision of Bank One's newly revised benefits plan (Opinion of the District Court, 9-3-05, P. 14; this Brief, P. 21a).

Haler and Keibler believe that Bank One's designation of RBC as a "successor employer" was a sham.

Not only were the jobs that RBC offered to Bank One's 38 employees of this brokered real estate business in the Midwest far inferior to the corresponding jobs at Bank One, but RBC did not even seem to be serious about pursuing the actual business that it bought from Bank One. It was only able to persuade ten of the 38 former Bank One employees to come to work for it (Opinion of the District Court, 9-30-05; P. 8; this Brief, P. 25a). It replaced Bank One's "broker packages," which made it very difficult for its new representatives to replace Bank One business (Haler Depo., Pp. 137-138). Finally, RBC entered Bank One's old market with a technologically backward approach to the business and no name-recognition in the market place (*id.*, P. 27). Not surprisingly, it was unable to compete in the Midwest for very long.

Despite RBC's apparent lack of elementary self-interest in entering into its agreement with Bank One, the agreement was of great benefit to Bank One. Completely aside from any consideration that RBC paid to Bank One, Bank One saved millions of dollars in severance benefits by being able to designate RBC as a "successor employer" under its benefits plan (Opinion of the District Court, 9-30-05, P. 10; this Brief, P. 27a).

* * *

Haler and Keibler sued Bank One and RBC Mortgage Company in the United States District Court for Southern Indiana on January 6, 2004. Their amended complaint (Appendix for the Court of Appeals, Pp. 23-27) articulated seven claims (Opinion of the District Court, 9-30-05, Pp. 3-4; this Brief, Pp. 19a-20a). The following among those claims are the subject of this petition:

> 1. Petitioners' claims against both RBC and Bank One for restraint of trade under the common-law of Indiana;
>
> 2. Petitioners' claim against RBC for tortious interference with Petitioners' prospect of continued employment, " . . . with Bank One in a position other than the positions from which Bank One had discharged them," (Opinion of the District Court, P. 3; this Brief, P. 19a), on June 16, 2003, under the common law of Indiana;
>
> 3. Petitioners' Federal claim against Bank One that it fired them in order to avoid paying them severance benefits, under the Employee Income Security Retirement Act (ERISA), 42 U.S.C. §1140.

In an opinion entered on September 20, 2005, the District Court rejected Petitioners' tortious interference claim against RBC because the entire basis of its purchase of Bank One's brokered real estate business, " . . . was the likelihood of the divisions' employees continuing with the buyer," (Opinion of the District Court, 9-30-05, P. 11; this Brief, P. 29a).

Petitioners agreed that the deal made little sense unless RBC could buy Bank One's employees; they believe that the Court's quoted statement proves the tortious nature of RBC's interference with Petitioners' prospects of employment with Bank One!

The District Court ignored Petitioners' arguments on this issue. They appear, in truncated form, in the "Argument" section of this Petition.

The District Court rejected Petitioners' common-law restraint of trade claims based upon the law that applies to covenants not to compete. It did acknowledge Petitioners'

> . . . asser[tion] that the law respecting such covenants do [sic] not apply to them [The Petitioners] because they did not consent to the Agreement [and that] the Agreement is between only RBC and Bank One and only they [and not the Petitioners] are bound by the Covenants (Opinion of the District Court, 9-30-05, P. 13; this Brief, P. 31a).

The District Court, however, did not acknowledge the controlling nature of this factual assertion and dismissed Petitioners' arguments based upon it as "futile," (*id.*), without even considering or acknowledging them.

The District Court dismissed Petitioners' statutory restraint of trade claim, pleaded under Burns Indiana Statutes §24-1-2-1, et seq., because the Courts have held that these statutory claims follow federal law interpreting the Sherman Anti-Trust Act.

The Federal act, of course, requires a showing of "anti-trust injury" or "competitive harm," and is subject to various "rules of reason," none of which apply to common-law restraint of trade claims. Petitioners conceded that they could not prove any of these harms or injuries (*id.*, Pp. 12-13; this Brief, P. 31a). They are not now pursuing this claim.

Finally, the District Court dismissed Petitioners' ERISA claims. It explained away Petitioners' proof that the agreement between Bank One and Chase appeared to be little more than a "cover" for Bank One to avoid severance payments without any citation of authority, except for that placing the Petitioners' claims within a *McDonnell-Douglass Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), type of framework (*id.*, Pp. 8-10; this Brief, Pp. 25a-27a).

Petitioners filed a timely FRCP 59(e) motion to set aside the District Court's judgment against them. On September 19, 2006, the Court denied this motion (Entry and Order of the District Court, 9-19-06; this Brief, Pp. 35a-39a).

On June 26, 2007, Petitioners appealed to the United States Court of Appeals for the Seventh Circuit.

The Court of Appeals affirmed the District Court's judgment against the Petitioners in all respects.

It held that the Petitioners had produced, " . . . no evidence that RBC was motivated by an intent to injure or damage the plaintiffs," (Opinion of the Court

of Appeals, P. 4; this Brief, P. 7a). The Court did at least acknowledge that which the District Court refused to mention: Petitioners' argument that

> . . . the no-hire provision offends public policy because it violates the Thirteenth Amendment's prohibition on slavery and involuntary servitude by preventing the plaintiffs from seeking employment with Bank One (*id.*, Footnote 1, Pp. 4-5; this Brief, Pp. 7a-8a).

The Court of Appeals characterized this argument as "frivolous" (*id.*).

The Court of Appeals came up with a new reason to affirm the District Court's dismissal of Petitioners' common-law restraint of trade claim. The Court held that the Indiana Supreme Court had opined in a 1909 case that the Indiana anti-trust statute, " . . . was intended to be declarative of the common-law prohibition against restraint of trade," (*id.*, P. 6; this Brief, P. 10a). It further reasoned that, "because the plaintiff's cannot establish a claim under Indiana's anti-trust statute [because of lack of proof of "market injury," etc.], their common law restraint of trade claims also fail," (*id.* this Brief, P. 11a).

The Court of Appeals also affirmed the District Court's dismissal of Petitioners' ERISA claims.

Petitioners moved for a panel rehearing or rehearing en banc. They argued against the Court of Appeals' "springing" its seriously flawed argument against their common-law restraint of trade claim without any notice. They pointed out the logical

jurisprudential and historical problems with the court's sua sponte argument in detail, as set forth later in this Petition. They denied that their arguments based upon the Thirteenth Amendment were frivolous or otherwise unworthy of consideration. Finally, in their petition for rehearing, Petitioners took the Court of Appeals to task for not considering the arguments or squarely facing any implications of corporations attempting to sell their at-will employees.

On August 27, 2004, the Court of Appeals denied Petitioners' effort to secure a rehearing (this Brief, Pp. 40a-41a).

ARGUMENT

The "Asset Purchase Agreement" between Respondents Bank One and RBC Mortgage Company was a per se violation of Petitioners' common-law right to freely trade and market their employment services. Because RBC's entering into the agreement interfered with the likely prospect that Petitioners would continue in positions of employment with Bank One, RBC's entering into the agreement was also a tortious interference with Petitioners' rights.

Finally, Bank One's arguable motive in entering into the agreement was to save millions of dollars in severance benefits, which it did. This fact, along with the sham nature of its transaction with RBC means that a jury could believe that Bank One's firing of Haler and Keibler violated 42 U.S.C. §1140 (ERISA).

The Restraint of Trade Issue

At Indiana common law, as well as that of most of its sister states, any and all contracts or agreements that create a restraint of trade, or even tend to restrain trade or suppress competition, are unlawful. *Knight & Jillson Co. v. Miller*, 172 Ind. 27, 871 N.E. 823, 828 (1909). This rule is necessary because in America, "Every man has the right to employ his talents, industry and capital, as he pleases, free from the dictation of others." *Jackson v. Stanfield*, 35 N.E. 345, 350-351 (Ind. 1894).

A plaintiff alleging this common-law tort need prove no certain degree of injury even to himself, much less to the "marketplace" or to the "competitive environment!" *Knight & Jillson Co., supra.* All he has to prove is the existence of a scheme, contract or combination that restrains trade or has such a tendency and that affects him; basically common-law restraint of trade is a strict liability tort, *id.*, *More v. Bennett*, 140 Ill. 69, 29 N.E. 888 (1892), cited in *Fort Wayne Cleaners & Dyers Association v. Price*, 137 N.E.2d 738, 742 (Ind. App. 1956), en banc.

Obviously a defendant to a restraint of trade claim cannot prevail by invoking defenses available to a party to a covenant not to compete, as the District Court seemed to believe. The law regarding covenants not to compete is premised upon all sorts of factors and considerations that have little, if any, application to the law of restraint of trade. There is no requirement that an alleged restraint of trade be in any

manner "unreasonable." At common law *any* restraint of trade is unlawful.

The Respondents' attorney admitted the obvious at oral argument before the Court of Appeals in this case: the agreement between Bank One and RBC Mortgage that is at the center of this case is a restraint of Petitioners' right to market their employment services.

Because of this, the Court of Appeals had to resort to a truly bizarre theory in order to affirm the District Court's dismissal of Petitioners' restraint of trade claim.

This argument is that the Indiana Supreme Court abandoned or abolished the common-law tort of restraint of trade in the case of *Knight & Jillson Co.*, *supra* (Opinion of the Court of Appeals, P. 6; this Brief, Pp. 10a-11a).

This argument is bizarre because the *Knight & Jillson Co.* opinion was an emphatic endorsement of the common-law tort of restraint of trade, and a rejection of proposed defenses to the tort.

It is true, as the Court of Appeals opined, that the Indiana high court in *Knight & Jillson*, *supra*, at 827, "... held that the Indiana anti-trust statute was intended to be declarative of the common-law prohibition against restraint of trade," (Opinion of the Court of Appeals, P. 6; this Brief, P. 10a).

But this hardly means that the Court was abandoning or abolishing the common-law tort of restraint

of trade. Instead, it was rebuffing efforts by corporate interests to persuade the Indiana Court to accept arguments that they had been making to this Court regarding the Sherman Anti-Trust Act. These arguments were that the plain language of the Sherman Act, enacted in 1890, and the Indiana Anti-Trust Act, enacted in 1897, did not really mean what they said, that their plain terms should be subjected to rules of "reasonableness," of various stripes.

These arguments did not carry the day with the Indiana Supreme Court that decided the *Knight & Jillson* case, just as they had not carried the day with this Court as of 1909.

The Indiana Anti-Trust Act mirrors the Sherman Act. It states that:

> Every scheme, contract, or combination in restraint of trade or commerce, or to carry out restrictions in trade or commerce, is illegal.

Burns Indiana Statutes, §24-1-2-1; 15 U.S.C. §1.

In *United States v. Knight*, 156 U.S. 1, 15 S.Ct. 249, 39 L.Ed. 305 (1896), again in *Northern Securities Co. v. United States*, 24 S.Ct. 436, 454 (1903) and *W. Y. Montague and Co. v. Lowry*, 193 U.S. 38, 46, 24 S.Ct. 307, 48 L.Ed. 608, 611 (1903), this Court rejected efforts to apply any "rule of reason" or limitations upon the plain language of the Sherman Anti-Trust Act, such as requiring a showing that restraints of trade have some sort of "anti-competitive" effect on the marketplace in order to be actionable.

Instead, in these cases, this Court did precisely what the Indiana Supreme Court did in 1909 in the *Knight & Jillson* case: it applied the plain language of the anti-trust statute and held that it was but a codification of the common-law prohibition against restraint of trade, which again, was (and is) a strict liability tort.

The Court that decided *Knight & Jillson* in 1909 could not know that:

> 1. In 1911 this Court would succumb to the repeated efforts of corporate interests to restrict the application of the Sherman Act with a "rule of reason" and other defenses to the Act that it had repeatedly rejected in the past. The court so succumbed in the case of *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 510, 55 L.Ed. 619 (1911);* or
>
> 2. Future Indiana appellate decision would follow this example in interpreting the application of the Indiana Anti-Trust Act (Opinion of the Court of Appeals, P. 5; this Brief, P. 11a).

No Indiana Court has ever held, as did the Court of Appeals in this case, that the *Knight & Jillson* opinion signaled the end of the common-law tort of restraint of trade in Indiana. Indeed, in a 1956 opinion previously

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* See dissent of Justice Harlan for a history of this Court's strict interpretation of the Sherman Act before it decided the *Standard Oil* case, *id.*, 31 S.Ct. at 524-439.

cited, *Fort Wayne Cleaners & Dryer's Association v. Price*, 137 N.E.2d 738 (Ind. App. 1956), en banc, the entire Indiana Court of Appeals approvingly cited two classic common-law restraint of trade cases in support of the plaintiff's claim of intentional interference against one of the parties to plaintiff's successful statutory restraint of trade claim: *Jackson v. Stanfield*, *supra*, and *More v. Bennett*, *supra*.

Even if the *Fort Wayne Cleaners* case itself did not involve common-law restraint of trade claims, it seems strange that the en banc Court that decided it would cite pre-1909 restraint of trade claims if it believed that the Indiana Supreme Court had abolished the tort in 1909!

The common-law tort of restraint of trade and its obvious off-shoot, the tort of intentional interference with the prospect of employment, are the only remedies available to individuals whose rights to market their services have been restrained. Obviously, individuals can rarely, if ever, prove the elements that the Courts have added to statutory restraint of trade claims over the years, such an "unreasonableness," "anti-competitive effect," and "anti-trust injury." Because of this, as well as the tenor of the *Fort Wayne Cleaners* case, Petitioners believe that the Indiana Courts would have upheld their common-law restraint of trade claim, instead of rejecting it as the Courts below have done.

The Intentional Interference Claim

The same is true of the Petitioners' intentional interference claim. As with their restraint of trade claim (indeed, the analysis of the two claims basically intersects), there is much more at stake than the Court of Appeals' obvious errors in interpreting the law of Indiana, although Indiana law certainly points the way toward the reasons why this Court should grant this petition.

The Indiana Courts and those of every other state in the union have long recognized that the common law of contracts and torts is more than the result-oriented application of dry legal theorems. As to contracts, for example, the Indiana Supreme Court in *Trotter v. Newson*, 684 N.E.2d 1150 (Ind. 1997) stated that any contract or agreement violates the public policy of Indiana if it:

> . . . has a tendency to injure the public, or is against the public good, or is inconsistent with sound policy and good morals, as to the consideration or as to the thing to be done or not to be done.

In the case at bar, the "thing to be done," was the preclusion of the Petitioners' job opportunities with their long-term employer in order to advance the short-term and narrow economic interests of the Respondents. The agreement accomplishing this unworthy goal clearly violated "sound policy" and "good morals."

If this were not apparent from the face of the agreement's language that RBC would "acquire" certain employees from Bank One and its other nefarious provisions, it is apparent from any analysis of the underpinnings of public policy in Indiana. These include the Constitution, statutes, and sound practices of a free people. *American Underwriters v. Turpin*, 149 Ind. App. 473, 289 N.E.2d 761 (Div. 2 1970).

Certainly, the Petitioners are entitled, under this principle of Indiana law, to invoke the Constitution of the United States in their quest for justice via the Indiana common-law torts of restraint of trade and intentional interference with the prospect of employment.

Petitioners did this in the Courts below, despite the indifference and outright hostility that they endured for doing so, by pointing to the Thirteenth Amendment to the Constitution of the United States.

Of course, they have never claimed that the Respondents sought to reduce them to chattels or subject them to the horrors of slavery as the Courts below apparently believe is a requirement for any reference to the Thirteenth Amendment.

Such a belief is certainly wrong.

The Thirteenth Amendment was adopted not only to end chattel slavery, but also to create and, " . . . maintain a system of completely free labor throughout the United States." *Pollock v. Williams*, 322 U.S. 4, 17, 65 S.Ct. 792, 799 (1944).

As this court said earlier in *Bailey v. Alabama*, 219 U.S. 219, 241, 31 S.Ct. 145, 151, 55 L.Ed. 191 (1910), the Thirteenth Amendment is a "charter of universal civil freedom for all persons of whatever color or estate," that prohibits "that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the involuntary servitude."

Thus no state may criminalize an individual's refusal to work, even after he has accepted an "advance" on his pay for the work. *Pollock*, *supra*, 64 S.Ct. at 799; *Taylor v. State of Georgia*, 315 U.S. 25, 29, 62 S.Ct. 415, 417 (1942).

No court may order an individual to work for a specific employer, even if he has an employment contract requiring that he do so. *In re Andrews*, 80 F.3d 906, 912 (4th Cir. 1996). Nor may a Court, a state, or a private employer attempt to enforce a tort remedy in favor of a past employer who seeks damages from an individual's present employer for hiring the individual away from the first employer.

This was illustrated in the case of *Shaw v. Fisher*, 102 S.E. 325 (S.C. 1920).

One Carver, a Sharecropper, agreed to work for farmer John Shaw during the year 1916. Three months into the contract, A. D. Fisher arrived at the Shaw place in Anderson County, South Carolina, and removed Carver and his belongings to Fisher's farm.

Shaw demanded that Fisher "return" Carver so that Carver could go back to work and fulfill his contract to Shaw. Fisher refused. Shaw sued Fisher for the tort off " . . . harboring plaintiff's servant," *id.*, at 326.

The trial court instructed the jury to find for Fisher if Carver had had good cause to quit his contract with Shaw. Carver testified that he had such cause; indeed he indicated that " . . . he would die and go to hell" before he would work another minute for Shaw. Still, the jury found for Shaw and awarded him $300 against Fisher.

The South Carolina Supreme Court reversed Shaw's judgment.

The Court acknowledged that the tort of "harboring a servant" had long been recognized at South Carolina law. But it held that the tort, and any efforts to enforce it, violated the Thirteenth Amendment to the Constitution of the United States. Carver, according to the Court, had a perfect right to work for whomever he pleased, provided that that person would hire him. Shaw's only remedy was to sue Carver for the breach of his employment contract, *id.*, at 326.

The Respondents in our case have created a contract version of the tort of "harboring a servant." Any effort by RBC to enforce Bank One's promise not to hire or solicit the Petitioners would violate the Thirteenth Amendment to the Constitution of the United States for the same reason that Shaw's effort

to enforce the tort of "harboring a servant" did so: because it would violate Petitioners' right to work for whomever they pleased who was willing to hire them.

Of course, it may be argued that Bank One had every right to fire and not re-hire Petitioners. This is true so long as Bank One was acting alone. In our case, however, it was not acting alone. Instead, it was acting in concert with RBC Mortgage Company. A jury could readily find that absent RBC's contracting with Bank One to "acquire" the employment services of the Petitioners, they would still be employed with Bank One at this very minute.

It is also beside the point that Bank One, under the facts of this case, was unlikely to violate its agreed-upon promise to fire and not re-hire the Petitioners. The promise, whether or not RBC ever sought to enforce it, was void as against the Thirteenth Amendment, and therefore the public policy of the State of Indiana.

As a matter of law, there could be no "justification" for RBC's entering into its agreement with Bank One. Any "malice" or evil "intent" by RBC to injure the Petitioners, which the Indiana Supreme Court itself has never said is any sort of requirement in an intentional interference case, *Bochnowski v. People's Federal Savings and Loan*, 571 N.E.2d 282 (Ind. 1991), is proven by RBC's entering into an agreement which was void as against the Thirteenth Amendment. Such an action can never be reflective of any sort of legitimate business purpose, as the Court of

Appeals opined (Opinion of the Court of Appeals, P. 4; this Brief, P. 7a).

The Petitioners proved every element of the tort of intentional interference with the prospect of employment against RBC, including the element of lack of justification, with its requirement of the weighing of seven distinct factors per the *Restatement 2d of Torts*, §766B and §767, comment at clause (g), *Winkler v. V. G. Reed and Sons*, 638 N.E.2d 1228 (Ind. 1994); especially the "social interests" factor which weighs heavily in favor of the plaintiff who shows that the interferer used improper means, *Restatement 2d of Torts*, §767(c). Petitioners' analysis of these factors and every issue related to this particular tort was thorough and precise. It consumed fifteen (15) pages of their brief for the Court of Appeals. Perhaps this was overkill; the Unconstitutionality of the contract that was the vehicle whereby RBC interfered with the Petitioners' prospect of continued employment with Bank One should have been enough to convince the Courts below that Petitioners had proven this tort claim. Unfortunately, it was not enough.

* * *

Of course, there are legitimate ways for companies to sell their assets while also discharging employees. If a company is truly going out of business or in serous distress, it will probably discharge most or all of its employees. That is what happened in *Winkler v. V. G. Reed*, *supra*, the one case cited by the

District Court in support of its dismissal of Petitioners' claim of intentional interference against RBC Mortgage Company. V. G. Reed Company's sale of its production facility was of the "fire sale" variety. Had it not sold the facility, all of its employees would have ended up unemployed. As it was, most went to work for the facility's purchaser. V. G. Reed's sale of its facility contained no mention of the buyer's "acquiring employees," and V. G. Reed made no promise to fire them or not to re-employ them, *id.*, 638 N.E.2d at 1230.

Bank One did not go out of business as did the V. G. Reed Company. Its business overall, and even its brokered mortgage "business," which was but one of the myriad forms of banking that banks engage in, was hardly in distress at the time of Bank One's transaction with RBC Mortgage Company. It was not a discrete sub-business whose employees were engaged in work foreign to the banking business! Bank One, now Chase Bank, was and remains a large and growing mega-bank with plenty of available positions for which the Petitioners and their co-workers were qualified in 2003 (Haler Depo., Pp. 17-18; Keibler Depo., P. 51). Its sale of the practically non-existent tangible assets of its brokered mortgage business could not justify its efforts to sell those whom it employed in that business.

Neither the Courts below nor the Respondents have cited any case or authority for the proposition that corporations may enter into agreements whereby they buy and sell at-will employees. Of course, there

are no such cases. Such an agreement should not be permitted to stand.

The ERISA Claim

29 U.S.C. §1140 prohibits employers' discharging their employee, " . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."

Petitioners believe that Bank One's sale of its brokered mortgage business was akin to the sale of a business unit with an " . . . above-average proportion of employees with pension rights about to vest," which violates 29 U.S.C. §1140, as above-quoted. *Andes v. Ford Motor Company*, 70 F.3d 1332, 1338 (D.C. Cir. 1995).

Indeed, this case presents an even stronger rationale for invoking 29 U.S.C. §1140 than the situation in the *Andes* case. This is because *all* of the Bank One employees that it sold to RBC, not merely some proportion of them, as was the case of the "near-vesting" employees in *Andes*, would have been eligible for Bank One's severance benefit under Bank One's Pay Continuation Plan absent the sale or some similar "successor employer" charade.

This fact, along with the arguably sham nature of Bank One's sale of its brokered mortgage business to RBC, was more than enough evidence to get Petitioners' ERISA claim to a jury.

CONCLUSION

The extent to which the common law of contracts and torts implicates the Thirteenth Amendment to the Constitution of the United States is an important question of federal law that has not been, but should be, settled by this Court, Supreme Court Rule 10(c). Alternatively, the opinion of the United States Court of Appeals for the Seventh Circuit in this case decided this important federal question in a way that conflicts with the relevant decisions of this Court, namely *Pollock v. Williams*, 322 U.S. 4, 65 S.Ct. 792 (1944), and *Bailey v. Alabama*, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1910), Supreme Court Rule 10(c); as well as with the relevant opinions of the Indiana Supreme Court, namely *Knight & Jillson Co. v. Miller*, 172 Ind. 27, 87 N.E. 823 (1909), and *Trotter v. Newson*, 684 N.E.2d 1150 (Ind. 1997), and the opinion of the South Carolina Supreme Court, namely, *Shaw v. Fisher*, 102 S.E. 325 (S.C. 1920), Supreme Court Rule 10(a). For these reasons, as set forth in detail in this Petition, this Court should issue a writ of certiorari in this case.

Respectfully submitted,

PHILIP C. KIMBALL
Attorney for Petitioners
1970 Douglass Boulevard
Louisville, KY 40205
(502) 454-4479

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued June 4, 2007
Decided June 26, 2007

Before

Hon. FRANK H. EASTERBROOK, *Chief Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DIANA S. SYKES, *Circuit Judge*

No. 06-3802

ELIZABETH DEICH-KEIBLER and LARRY K. HALER, *Plaintiffs-Appellants*,	Appeal from the United States District Court for the Southern District of Indiana, New Albany Division.
v.	No. 04 C 5
BANK ONE and RBC MORTGAGE COMPANY, *Defendants-Appellees.*	Sarah Evans Barker, *Judge*.

ORDER

The plaintiffs, Elizabeth Deich-Keibler and Larry Haler, brought this action against the defendants, Bank One and RBC Mortgage Co. ("RBC"), alleging violations of the Employee Retirement Income Security Act ("ERISA") by Bank One and violations of

Indiana statutory and common law by both Bank One and RBC in connection with Bank One's sale of its brokered mortgage loan sales division ("Division") to RBC in June 2003. On cross-motions for summary judgment, the district court granted judgment in favor of Bank One and RBC on each of the plaintiffs' claims. The plaintiffs now appeal. For the reasons set forth in this order, we affirm.

I

BACKGROUND

A.

In June 2003, Bank One and RBC entered into an agreement whereby Bank One would sell the Division to RBC. RBC viewed employing Bank One's employees as advantageous, given the employees' established customer relationships; therefore, RBC planned to offer positions to Bank One's employees in the Division. To facilitate RBC's hiring, the sales agreement prohibited Bank One, for a period of 180 days, from soliciting for employment those Division employees to whom RBC offered jobs ("no-hire provision").

At the time of the sale, the plaintiffs worked in the Division. The plaintiffs were offered jobs by RBC, but rejected the offers. The plaintiffs attempted to find other positions in Bank One, as they had when prior reorganizations by Bank One eliminated the positions they had occupied, but were told that Bank

One could not offer them employment under the sales agreement.

The plaintiffs then sought benefits from Bank One's Pay Continuation Plan ("Plan"). The Plan provided severance pay and other benefits to terminated Bank One employees. Following an amendment in 2002, however, the Plan did not provide benefits to terminated employees when the employee was terminated in connection with the sale of a portion of Bank One's business and the purchasing company offered the employee work pursuant to a requirement of the sales agreement. Because the plaintiffs had been offered employment by RBC under the terms of the sales agreement between RBC and Bank One, the plaintiffs were denied benefits under the Plan.

B.

The plaintiffs then brought this action against RBC and Bank One. They asserted an Indiana common law claim against RBC for tortious interference with their employment contracts with Bank One. The plaintiffs further asserted that the no-hire provision was an unlawful restraint of trade in violation of Indiana statutory and common law. The plaintiffs also contended that Bank One wrongfully had denied them benefits under the Plan and that Bank One had discharged them in retaliation for attempting to exercise their rights under the Plan in violation of ERISA § 510, 29 U.S.C. § 1140.

The parties filed cross-motions for summary judgment. The district court concluded that the plaintiffs had failed to come forward with evidence that RBC had acted without justification when it purchased the Division, resulting in the plaintiffs' termination from Bank One. Therefore, the court held, RBC was entitled to summary judgment in its favor on the plaintiffs' tortious interference claims. The court further concluded that, because the plaintiffs had presented no evidence of an antitrust injury as a result of the agreement between RBC and Bank One, RBC and Bank One were entitled to summary judgment on the plaintiffs' Indiana statutory antitrust claims. The court also concluded that the no-hire provision did not constitute an unreasonable restraint of trade, thereby entitling RBC and Bank One to summary judgment on the plaintiffs' Indiana common law restraint of trade claims. Next, the court concluded that Bank One was entitled to summary judgment on the plaintiffs' ERISA denial of benefits claims because Bank One's denial of the plaintiffs' claims for benefits under the Plan was not arbitrary and capricious. Lastly, the court determined that the plaintiffs had failed to rebut Bank One's legitimate, non-discriminatory explanation for terminating the plaintiffs, and, therefore, Bank One was entitled to summary judgment on the plaintiffs' ERISA discriminatory termination claims.

II

DISCUSSION

The plaintiffs now appeal the district court's decision granting summary judgment in favor of RBC and Bank One. The plaintiffs first contend that RBC tortiously interfered with their contract rights with Bank One by inducing Bank One to terminate them in connection with the sale of the Division. The plaintiffs next contend that the no-hire provision of the sales agreement constituted an unreasonable restraint on trade in violation of Indiana's antitrust statutes and common law. The plaintiffs also appeal the district court's conclusion that Bank One had not discriminated against the plaintiffs for attempting to exercise their rights under ERISA. The plaintiffs have abandoned their claim of wrongful denial of benefits under ERISA on appeal.

We review a district court's grant of summary judgment de novo. *Clark v. State Farm Mut. Auto. Ins. Co.*, 473 F.3d 708, 712 (7th Cir. 2007). Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). For those claims brought under Indiana law, we shall apply "Indiana law as we believe the Supreme Court of Indiana would if faced with the same issue." *Clark*, 473 F.3d at 712. On cross-motions for summary judgment, we view all facts and draw all reasonable inferences therefrom in the light most favorable to

the party against whom the motion is made. *Employers Mut. Cas. Co. v. Skoutaris,* 453 F.3d 915, 923 (7th Cir. 2006). The non-moving party must come forward with evidence of specific facts demonstrating a genuine issue for trial with respect any issue for which that party bears the ultimate burden of proof at trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

A. Plaintiffs' Tortious Interference Claims

The plaintiffs first contend that RBC tortiously interfered with their employment relationship with Bank One. Indiana recognizes a cause of action for tortious interference with a party's employment contract. *Trail v. Boys & Girls Clubs of N.W. Indiana,* 845 N.E.2d 130, 138 (Ind. 2006). This cause of action extends to an employees' rights under at-will employment contracts, such as those between Bank One and the plaintiffs. *See id.* The plaintiffs must establish the following to make out a claim for tortious interference with a contractual relationship: (1) the existence of a valid, enforceable contract; (2) the defendant's knowledge of the contract's existence; (3) the defendant's intent to induce a breach of that contract; (4) the absence of justification; and (5) damages resulting from the defendant's inducement to breach the contract. *Winkler v. V.G. Reed & Sons, Inc.,* 638 N.E.2d 1228, 1235 (Ind. 1994). To establish that a defendant acted without justification, the plaintiff must establish that the resulting breach was "malicious and exclusively directed to the injury and

damage of another." *Bilimoria Computer Sys., LLC v. America Online, Inc.*, 829 N.E.2d 150, 156-57 (Ind. Ct. App. 2005). Additionally, because the contract at issue here is an at-will employment contract, the plaintiffs also must "show that the defendant interferer acted intentionally and without a legitimate business purpose." *Trail*, 845 N.E.2d at 138 (citing *Bochnowski v. Peoples Fed. Sav. & Loan Ass'n*, 571 N.E.2d 282, 285 (Ind. 1991)).

The primary issue here is whether RBC acted without justification when it induced Bank One to terminate the plaintiffs in conjunction with the sale of the Division to RBC. The plaintiffs have come forward with no evidence that RBC was motivated by malice or an intent to injure or damage the plaintiffs. Indeed, RBC offered both plaintiffs positions and it is undisputed that RBC considered employment of Bank One's employees a key part of its business strategy. Furthermore, the plaintiffs recognize that RBC's decision to purchase Bank One's operations was a legitimate business interest: expanding RBC's own business. Because the plaintiffs cannot establish that RBC acted without justification and without a legitimate business purpose, RBC is entitled to summary judgment on the plaintiffs' claim of tortious interference with their employment contracts with Bank One.[1]

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[1] The plaintiffs also submit that the no-hire provision offends public policy because it violates the Thirteenth Amendment's

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B. Indiana Statutory Antitrust Claims

The plaintiffs next assert that the no-hire provision was an unlawful restraint of trade on the part of RBC and Bank One, in violation of Indiana's antitrust act, I.C. § 24-1-2-1, et seq. The act provides for a private right of action by individuals injured as a result of violations of the act. *Id.* § 24-1-2-7. The elements of a private action for violation of the Indiana act are: "1) a violation of the statute, 2) injury to a person's business or property proximately caused by the violation, and 3) actual damages." *City of Auburn v. Mavis,* 468 N.E.2d 584, 585 (Ind. Ct. App. 1984). The second element of a private action also requires a showing of "antitrust injury": "the type of injury which the antitrust laws intend to prevent and the type of injury which naturally flows from what makes the defendant's acts unlawful." *Id.* at 586; *see also Berghausen v. Microsoft Corp.,* 765 N.E.2d 592, 597 (Ind. Ct. App. 2002).

The plaintiffs concede that they cannot demonstrate an antitrust injury, but contend that, because they are private individuals as opposed to corporations, they should be permitted to recover without demonstrating antitrust injury. Because this claim arises under Indiana law, we must decide the issue "as we believe the Supreme Court of Indiana would if

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prohibition on slavery and involuntary servitude by preventing the plaintiffs from seeking employment with Bank One. We deem this contention frivolous and shall not address it further.

faced with the same issue." *Clark,* 473 F.3d at 712. In doing so, we may look to the decisions of the Indiana courts that construe the Indiana antitrust statute. *Id.* We have found nothing in the decisions of the Indiana courts of appeals to indicate that the Supreme Court of Indiana would create the exception urged by the plaintiffs.

Further, such an exception would be inconsistent with the statute authorizing a private right of action for violations of the Indiana act. This statute provides a private right of action for "[a]ny person who shall be injured in his business or property by any person or corporation *by reason of the doing* by any person or persons of *anything forbidden or declared to be unlawful"* by the Indiana act. I.C. § 24-1-2-7 (emphasis added). The text of the statute makes clear that the private action provides recovery for injuries only when the violation of the act is the reason for the injury. What the act forbids or declares unlawful are schemes, contracts or combinations that restrain trade, as that concept is understood in federal antitrust law. *See* I.C. § 24-1-2-1; *see also Rumple v. Bloomington Hosp.,* 422 N.E.2d 1309, 1315 (Ind. Ct. App. 1991) (noting that the Indiana act was modeled after section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and has been interpreted consistent with the Sherman Act). It follows that the anti-competitive conduct must be the reason for the plaintiffs' injuries for their claims to fall within I.C. § 24-1-2-7.

Thus, there is nothing in the statute or the decisions of the courts of Indiana to support the view

that the Supreme Court of Indiana would waive the element of proof of an antitrust injury for individuals in the plaintiffs' position. Because the plaintiffs cannot demonstrate antitrust injury, RBC and Bank One are entitled to summary judgment in their favor on the plaintiffs' Indiana statutory antitrust claims.

C. Indiana Common Law Restraint of Trade Claims

The plaintiffs also assert Indiana common law restraint of trade claims against RBC and Bank One. Before enacting its antitrust statutes, Indiana recognized a common law private right of action in those individuals injured by acts in restraint of competition. *See Knight & Jillson Co. v. Miller,* 87 N.E. 823, 827-28 (Ind. 1909). The Indiana courts have held that the Indiana antitrust statute was intended to be declarative of the common law prohibition against restraint of trade. *See id.* at 827. Indiana has no modern cases involving the common law tort of restraint of trade distinct from the elements of an action under Indiana's antitrust statutes.[2] Because

[2] The plaintiffs cite *Fort Wayne Cleaners & Dryers Ass'n v. Price*, 137 N.E.2d 738 (Ind. Ct. App. 1956) (en banc), for the proposition that a party may pursue both common law and statutory actions for restraint of trade. Although *Fort Wayne Cleaners* involved both common law and statutory claims, nothing in the decision suggests that the common law claims were for the tort of restraint of trade. A close reading of the case suggests that the common law claims in that case were for tortious interference with business relations, a separate tort

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the Indiana antitrust statutes are considered to be declarative of the common law, *see id.*, there is no reason to believe that the elements of a common law action for restraint of trade differ from those of a statutory cause of action. Therefore, because the plaintiffs cannot establish a claim under Indiana's antitrust statute, their common law restraint of trade claims also fail.

D. Plaintiffs' ERISA Discriminatory Discharge Claims

Lastly, The plaintiffs allege that Bank One discharged them in order to prevent or otherwise discriminate against them from exercising their rights under the Plan in violation of ERISA § 510.[3] They assert two distinct theories in support of this claim. The plaintiffs first contend that the sale of the Division itself violated ERISA § 510 because the sale

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that remains actionable in Indiana. *See id.* at 741-42 ("There can be no doubt in [Indiana] that it is an actionable wrong to interfere, either directly or indirectly, with the business of another without cause or justification. . . .").

[3] Section 510 provides, in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . .

29 U.S.C. § 1140.

was motivated by a desire to prevent all of the Division's employees from exercising their rights under the Plan.

We have not addressed the issue of whether the sale of a division may constitute a violation of § 510. However, the Court of Appeals for the District of Columbia Circuit has held that a party may establish a violation of § 510 under such circumstances, but "only by showing that some ERISA-related characteristic special to the unit . . . was essential to the firm's selecting the unit for closure or sale." *Andes v. Ford Motor Co.*, 70 F.3d 1332, 1338 (D.C. Cir. 1995). Bank One met its initial burden on summary judgment by pointing to the absence of evidence that denial of the plaintiffs' *benefits* under the plan was essential to Bank One's decision to sell the Division. *See Celotex*, 477 U.S. at 325. In short, to survive summary judgment, the plaintiffs were required to come forward with evidence of specific facts to raise a genuine issue of fact as to whether Bank One intended to discriminate against this particular division because of some characteristic of the benefit plan. *See* Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 248. The plaintiffs have not provided such evidence. Therefore, Bank One was entitled to summary judgment in its favor on this theory.

The plaintiffs also advance a theory of disparate treatment in support of their claim that Bank One discharged them in violation of ERISA § 510. They contend that Bank One either awarded benefits or allowed other employees of the Division who did not

request benefits under the Plan to remain at Bank One.

The plaintiffs attempt to establish their theory of disparate treatment under the indirect method of proof using the burden-shifting analysis of *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973), which we have applied to ERISA § 510 claims. *See Salus v. GTE Directories Serv. Corp.,* 104 F.3d 131, 135 (7th Cir. 1997). To proceed under this approach, the plaintiff must first establish a prima facie case of discrimination "by demonstrating that he (1) belongs to the protected class; (2) was qualified for his job position; and (3) was discharged or denied employment under circumstances that provide some basis for believing that the prohibited intent to retaliate was present." *Id.* If the plaintiff makes this prima facie showing, the burden shifts to the employer to present a legitimate, non-discriminatory reason for its action. *Id.* The burden then shifts back to the plaintiff to demonstrate that the proffered explanation is pretext.

The plaintiffs have not made a prima facie case of discrimination or retaliation. The record demonstrates that the plaintiffs were notified that they would be terminated before any request for benefits was made. Further, there is no indication in the record that Bank One was aware that the plaintiffs intended to request benefits under the Plan at the time it discharged them. Such circumstances do not provide a "basis for believing that the prohibited intent to retaliate was present." *Id.*

Assuming that the plaintiffs have met their initial burden of establishing a prima facie case of discrimination, Bank One has come forward with a legitimate, non-pretextual explanation. Bank One explains that its decision to terminate the plaintiffs was the result of selling the Division. To meet their burden on summary judgment to demonstrate that Bank One's proffered reason was pretext, the plaintiffs must come forward with "evidence of specific facts that call into question the veracity" of Bank One's proffered reasons. *Hague v. Thompson Distribution Co.*, 436 F.3d 816, 827 (7th Cir. 2006) (applying the *McDonnell-Douglas* burden-shifting analysis in the context of racial discrimination).

The plaintiffs attempt to meet this burden by pointing to three comparison employees. The first comparison employee, Chris Shrader, also was terminated by Bank One as a result of the sale to RBC, but allegedly received benefits under the Plan. The fact that Shrader also was terminated supports Bank One's proffered reason that the plaintiffs were terminated because of the sale. The plaintiffs submit no evidence regarding second comparison employee, Leo Liberio. Rather, the plaintiffs simply assert their belief that Liberio either still works for Bank One or received benefits under the Plan. Such unsupported beliefs do not constitute evidence of specific facts for purposes of summary judgment. *See* Fed. R. Civ. P. 56(e). The third comparison employee, Jerry Bevers, formerly worked in the Division but now works for Chase Home Finance, a successor corporation to

Bank One. The plaintiffs provide no specific facts with respect to how Bevers came to work there. In short, these comparisons provide no evidence of specific facts that would call into question the veracity of Bank One's proffered non-discriminatory explanation. Therefore, Bank One is entitled to summary judgment in its favor on the plaintiffs' disparate treatment theory of ERISA discrimination.

Conclusion

The decision of the district court granting summary judgment in favor of Bank One and RBC is affirmed.

AFFIRMED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

ELIZABETH DEICH-KEIBLER and LARRY K. HALER, Plaintiffs, *vs.* BANK ONE and RBC MORTGAGE COMPANY, Defendants.	**CAUSE NO. 4:04-CV-00005-SEB-WGH**

ENTRY

Defendants' Motion for Summary Judgment (doc. no. 33)
Plaintiffs' Cross-Motion for Summary Judgment (doc. no. 41)

This Cause comes before the Court on the parties' cross-motions for summary judgment. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). If a case is not entirely adjudicated on summary judgment, then a partial summary judgment may be entered on the issue of liability alone, *id.*, or an order may be issued specifying the facts not in material dispute, Fed. R. Civ. P. 56(d).

Plaintiffs Elizabeth Deich-Kiebler and Larry K. Haler were employed by defendant Bank One, NA (now JPMorgan Chase Bank) in its brokered mortgage loan sales division ("division") handling the Kentucky and southern Indiana regions respectively, In 2003, Bank One discontinued its brokered mortgage loan sales business and sold and leased certain of its division's assets to defendant RBC Mortgage Company. RBC had expressed interest in acquiring the division's sales staff as well. On June 15, 2003, Bank One terminated the plaintiffs in connection with the sale of the division. As part of the deal, Bank One agreed with RBC to not employ or solicit any former division employee for a period of six months from the effective dates defined in the agreement. Asset Purchase Agreement ("Agreement"), ¶ 3.10(b); Bank One Responses to Plaintiffs' First Interrogatories, no. 2. Pursuant to an agreement with Bank One, RBC offered jobs to the division employees, including the plaintiffs. The plaintiffs declined the job offers and sought severance benefits from Bank One instead. Both plaintiffs found alternate employment.

Bank One had in effect at the time of the plaintiffs' terminations, a Pay Continuation Plan ("Plan"), as amended and restated effective January 1, 2003, which provided for temporary continuation of certain benefits and pay (severance pay) following termination of employment. Under the terms of the Plan, the Plan Administrator "makes the rules and regulations necessary to administer the Plan" and has "the responsibility and the sole discretionary authority to

control the operation and administration of the Plan, including without limitation, the power to interpret the terms of this Plan, to make any finding of fact necessary or appropriate for any purpose under the Plan, to determine eligibility for benefits, and to determine the amount of such benefits. . . ." Summary Plan Description ("SPD"), p. 11. The SPD also provides that "[t]he interpretations and determinations of the Plan Administrator shall be final and binding." *Id.*

The Plan contained the follow provision:

> You will not be eligible for benefits under the Plan if any of the following apply:
>
> * * *
>
> • You are offered employment with a **Successor Employer** as a result of an arrangement or agreement between Bank One and the **Successor Employer** (e.g., sale of business, outsourcing situation) or otherwise experience no employment loss in such situation. . . .

SPD, pp. 5-6. The Plan defines a Successor Employer as "any entity that assumes operations or functions formerly carried out by Bank One, any entity to whom Bank One has outsourced any of its functions or sold any of its assets or operations or any entity that offers you employment at the request of or pursuant to an agreement or arrangement with Bank One." *Id.*, p. 3. The Plan Administrator notified the plaintiffs that their applications for pay continuation

benefits were denied because they were offered employment with a successor employer pursuant to an arrangement with Bank One and thus were ineligible for benefits under the terms of the Plan. The plaintiffs then instituted this suit.

The plaintiffs assert seven claims in this Cause:

> First, a state common-law tortious-interference claim against RBC asserting that, by participating in the Agreement with Bank One, RBC tortiously interfered with the plaintiffs' "right to continue in employment with Bank One in a position other than the positions from which Bank One had discharged them. . . ."
>
> Second, a state common-law restraint-of-trade claim against RBC asserting that, by the same conduct, RBC had engaged in a restraint of trade of the plaintiffs' right to freely trade and market their skills and abilities in the employment marketplace.
>
> Third, a state statutory restraint-of-trade claim against RBC asserting that, by the same conduct, RBC had violated Indiana Code § 24-1-2-1.
>
> Fourth, a state common-law restraint-of-trade claim against Bank One asserting that Bank One's participation in the Agreement constituted a restraint of the plaintiffs' common-law right to freely trade and market their skills and abilities in the employment marketplace.

> Fifth, a state statutory restraint-of-trade claim against Bank One asserting that the same conduct violated Indiana Code § 24-1-2-1.
>
> Sixth, a federal ERISA claim against Bank One asserting that it discharged the plaintiffs in substantial part for the purpose of denying them benefits under the Plan in violation of 29 U.S.C. § 1140.
>
> Seventh, a federal ERISA claim against Bank One asserting that it had improperly denied the plaintiffs' claims for benefits under the Plan in violation of 29 U.S.C. § 1140.

Amended Complaint, ¶¶ 15-17.

The defendants move for summary judgment on all claims. The plaintiffs cross-move for summary judgment.

ERISA claim against Bank One for improper denial of benefits.

Bank One contends that, because the Plan gives authority and discretion to the Plan Administrator, including unfettered discretion to interpret the terms of the Plan and make eligibility determinations thereunder, its decisions should not be reversed unless they are arbitrary and capricious or an abuse of discretion. *Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990); *Russo v. Health, Welfare & Pension Fund*, 984 P.2d 762, 765 (7th Cir. 1993). Bank One contends that Plan Administrator's denials

of the plaintiffs' claims were not arbitrary, capricious, or an abuse of discretion, and summary judgment should be entered against this claim.

The plaintiffs conceded that "under Bank One's 'Pay Continuation Plan,' the Plan Administrator was entitled to deny their claims for the severance benefit based upon the language of the Plan." (Plaintiffs' Memorandum of Authorities (doc. no. 44-2) ("Plaintiffs' Response"), p. 35). However, in responding to Bank One's argument on the plaintiffs' improper-termination claim, they alleged two instances where the Plan paid severance benefits to two division employees. The Court construes these allegations of discriminatory treatment to be directed at the arbitrariness of the Plan Administrator's denials of the plaintiffs' applications for benefits and not arguments in support of their claims of discriminatory termination.

Examination of the plaintiffs' allegations of discriminatory treatment and their factual support show no genuine dispute of material fact. In their response to Bank One's motion, the plaintiffs state that they "believe" that Bank One "accommodated Leo Liberio's 'special circumstances' while refusing to do so [*sic*] the same for Keibler," (Plaintiffs' Response, p. 37), and that Mr. Liberio "may have" received severance benefits under the Plan, (*id.*, p. 12). With regard to the plaintiffs' supervisor at Bank One, Chris Shrader, they directly assert that he received severance benefits under the Plan. *(Id.*, pp. 37 and

12). The plaintiffs cite only their own deposition testimonies as evidence. *(Id.,* p. 12).

The allegations regarding Mr. Liberio are based on Ms. Deich-Kiebler's testimony at p. 157 of her deposition and on Mr. Haber's testimony at p. 157 of his deposition, However, Ms. Deich-Kiebler testifies without qualification that she does not know what happened to Mr. Liberio, whether he continued working for Bank One or whether he received a severance payment under the Plan. Similarly, Mr. Haler testified that he only "suspicioned that Leo Liberio may have received a Bank One severance, because he was not at the Chicago meeting, and I didn't see his name on the list." After undertaking discovery in this Cause, the plaintiffs neither submit nor cite to any independent documentation or other certain evidence tending to show that Mr. Liberio received severance benefits under the Plan.[1] Beliefs and suspicions do not create genuine issues of material fact.

The allegation that Mr. Shrader received severance benefits from Bank One is based on Mr. Haler's deposition testimony, during which a recording of a

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[1] Although similarly unsupported by evidence, Bank One asserted in its reply that Mr. Liberio "was treated the same way as other Bank One sales employees. He was offered a job at RBC and subsequently was terminated from Bank One." (Defendants' Reply Memorandum and Response to Cross-Motion (doc. no. 48), p. 7). It does not comment on whether he received a severance payment.

voice-mail message from Mr. Shrader to Mr. Haler was played in which Mr. Shrader says, in part, "By the way, I got my Bank One severance." (Haler Deposition, p. 187). During a subsequent telephone conversation between Mr. Haler and Mr. Shrader, secretly recorded by Mr. Haler, Mr. Shrader states only that he "got severance" after being terminated by RBC, without identifying the source of the payment as Bank One. (*Id.*, p. 192, 200-01). In its reply, Bank One denies that the Plan paid Mr. Shrader severance benefits, (Defendants' Reply Memorandum and Response to Cross-Motion (doc. no. 48) ("Defendants' Reply"), p. 7), but without citation to evidentiary support. However, it cites to a provision in the Agreement that required RBC, if it terminated any former Bank One employee within six months of hire, to pay severance benefits "that are no less valuable, in the aggregate" than the severance benefits the former employee would have received under Bank One's Plan. Agreement, ¶ 3.02(a). Based on the date of Mr. Shrader's voice-mail message, Bank One asserts that Mr. Shrader was terminated by RBC within this six-month period and implies that Mr. Shrader must have mistakenly referred to his payment as a "Bank One severance" because it was required and calculated based on the terms of Bank One's Plan. Unfortunately, there is no affidavit or documentation from Mr. Shrader, Bank One, or RBC submitted on the present motion to confirm the source of Mr. Shrader's severance payment. Based on this record and Bank One's representations, it

appears more likely that Mr. Shrader received his severance payment from RBC, not the Plan.

However, even if the payment was made by Bank One to Mr. Shrader, the plaintiffs point to no other improper severance payments made by the Plan, whether in relation to the RBC sale or otherwise. They also fail to identify any distinguishing characteristic or factor that would support an implication of discriminatory motive in favor of Mr. Shrader and against the plaintiffs. One wrong benefits decision alone does not reasonably support a claim that the Plan's earlier denials of the plaintiffs' applications – which they concede were proper based on the terms of the Plan – were arbitrary, capricious, or abuses of discretion.

The plaintiffs' allegations of discriminatory administration being rejected, it is clear that, under the terms of the Plan, RBC qualifies as a "successor employer" and that there is no dispute that it offered employment to the plaintiffs pursuant to an agreement with Bank One in relation to the division sale. Therefore, without regard to the plaintiffs' other claims, there is no genuine dispute that the Plan Administrator's denials of the plaintiffs' applications for benefits under the Plan were not arbitrary, capricious, or an abuse of discretion and did not violate 29 U.S.C. § 1140 on these grounds.

ERISA claim against Bank One for improper termination.

The plaintiffs assert that Bank One violated ERISA, 42 U.S.C. § 1140 which prohibits employers from, in part, discharging or discriminating against employees "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . ." They assert that Bank One sold the division to RBC in order to avoid paying Plan severance benefits to the terminated employees. Assuming *arguendo* that § 1140 applies in the context of sales of ongoing business units, *see Andes v. Ford Motor Co.*, 70 F.3d 1332 (D.C. Cir. 1006); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986), the plaintiffs have not shown that they can prove Bank One sold the division with the specific intent to deprive the plaintiffs of their severance benefits under the Plan.

The *McDonnell-Douglass* burden shifting analysis applies to claims of ERISA discrimination. *McNab v. General Motors Corp.*, 987 F.Supp. 1115, 1125 (S.D. Ind. 1997). Assuming that the plaintiffs have stated a *prima facie* case, Bank One has asserted a neutral, non-discriminatory reason for the sale to RBC: it chose to discontinue the brokered real estate lending business for business reasons, "in order to focus company resources and efforts on more profitable direct loan products and services." Bevers Affidavit, ¶ 2. The plaintiffs rely on three facts as evidence that Bank One's proffered reason is a sham. First, the division sale resulted in only 10 of the 38 non-management

former Bank One employees accepting employment with RBC, which had less-favorable benefits and business ability than Bank One. But the fact that most of the former Bank One employees voluntarily chose not to accept RBC's offers of employment does not suggest that Bank One did not have a business purpose for the sale or that RBC's offers of employment were not genuine. There is no requirement that division sellers find buyers with equal or better benefit packages in order to avoid the implication of sham sales. To accept the plaintiffs' contention based on the difference in benefits and business prospects of RBC, the evidence would need to show that Bank One not only wanted to structure its withdrawal from the wholesale mortgage business as a division sale instead of an outright termination of employees in order to avoid severance benefits, but that it also specifically intended that its former employees end up unemployed instead of working for a successor company, and therefore Bank One looked for a company with poor prospects and benefits with whom to collude. The plaintiffs' evidence does not reasonably show such a plan and intention by Bank One.

The second evidence of sham is that Bank One "departed from its past practice of permitting employees in similar situations to take other positions within the Bank." (Plaintiffs' Response, p. 36). But the supporting evidence on which plaintiffs rely, their own experiences, do not relate to the similar situation of Bank One's sale of an ongoing business unit to a buyer wanting to continue the business with the

same personnel. Again, for plaintiffs' contention of a sham transaction be accepted, there must be evidence showing that Bank One colluded with RBC in order to make a sham sale to RBC and for it to make sham offers of employment to Bank One's division employees. The plaintiffs offer no evidence that RBC's asserted business desire to continue the wholesale mortgage business with the experience and contacts of the existing Bank One employees was a sham.

The third piece of evidence the plaintiffs propose to show that Bank One's proffered business reason for the sale of the division is a sham is that the sale saved the Plan millions of dollars in severance payments. But this is only the outcome of the sale of which the plaintiffs complain; it is the subject matter on which evidence of specific intent is sought.

Because the plaintiffs have not shown that Bank One's proffered business reason for selling the division as an ongoing concern is pretextual, they cannot satisfy the *McDonnell-Douglass* burden-shifting analysis and have not shown a genuine issue of material fact. Bank One is due judgment as a matter of law on the plaintiffs' ERISA claim for discriminatory denial of benefits.

ERISA preemption of state law claims.

Bank One argues that the plaintiffs' state law claims of tortious interference and restraint of trade are preempted by ERISA because the plaintiffs are primarily concerned about receiving benefits under

the Plan and their claimed damages, described in terms of the plaintiffs' lost pay and benefits, would require interpretation of the Plan's terms to determine eligibility and permit the calculation of benefits. In their state-law claims, the plaintiffs do not challenge Bank One' [sic] sale of the division to RBC or the Plan's denial of severance benefits to them; instead, they challenge only the provision of the sale whereby Bank One agreed to not employ or solicit the former division employees for a period of six months. Whether that provision violates the state's tortious-interference or restraint-of-trade laws can be determined without interpretation of the terms of the Plan and without reference to the existence of the Plan. While the plaintiffs do seek the value of their severance and other Plan benefits as damages, they have also pled direct ERISA claims which support such damages. Whether the plaintiffs may obtain the value of their severance benefits as damages in their state claims, and whether this invokes ERISA preemption, need not be decided for the purposes of the present motion.

Tortious interference claim against RBC.

The plaintiffs claim that RBC tortiously interfered with their prospect of continued employment with Bank One. The elements of a tortious-interference claim in Indiana are: (1) a valid and enforceable contract; (2) defendant's knowledge of that contract; (3) defendant's intentional inducement of breach of that contract; (4) the absence of justification; and

(5) damages resulting from the breach. *Winkler v. V. G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1235 (Ind. 1994). The plaintiffs do not assert that RBC's "inducement" of Bank One to terminate them was tortious – and *Winkler* itself dooms such a contention on the business-justification element. Instead, they complain only about the no-hire clause: they contend that RBC tortiously induced Bank One to agree to not employ or solicit the plaintiffs for six months and thereby interfered with the plaintiffs' rights to continued or future employment with Bank One.

A hope or a desire for continued or new employment, however, is not a valid and enforceable contract especially in Indiana's employment-at-will regime. The plaintiffs do not dispute the defendants' assertion that a major part of the division's value as an asset – what made it attractive to a buyer – was the likelihood of the division's employees continuing with the buyer. Bank One therefore had an independent incentive and purpose for not retaining the division's employees and not rehiring them for a period of time. The plaintiffs do not allege or show that, but for the formal no-hire provision, Bank One would have continued to employ them or would have rehired them before expiration of the exclusion period. They point to previous transfers and retentions of employees as Bank One made business changes, but none of those instances involved the intact sale of an ongoing division. Furthermore, under *Winkler*, there is no doubt that such an agreement is justifiable on the same business-judgment reasons upheld in that case.

The plaintiffs do not contradict the defendants' evidence that Bank One intended to discontinue the wholesale mortgage division for business reasons in order to concentrate on more profitable endeavors, that RBC wanted to enter the same business by purchasing Bank One's division, and that RBC desired to retain Bank One's experienced employees in order to improve its business prospects for a smooth transition and an efficient and profitable operation. Because the plaintiffs have not shown that they can establish the "valid and enforceable contract" and "absence of justification" elements of a tortious interference claim, summary judgment should be entered against the claim.

Restraint of trade claims against Bank One and RBC.

The plaintiffs assert restraint-of-trade claims under both statute, Ind. Code § 24-1-2-1, and common-law. Because Indiana Code § 24-1-2-1, which prohibits "[e]very scheme, contract, or combination in restraint of trade or commerce," is patterned after the federal Sherman Antitrust Act, *Tilbury v. City of Fort Wayne,* 471 N.E.2d 1183, 1185 (Ind. App. 1984); *Orion's Belt, Inc. v. Kayser-Roth Corp.,* 433 F.Supp. 301, 302-03 (S.D. Ind. 1977), courts refer to the federal statute and interpretations thereunder to inform their interpretations of the Indiana act, *id*; *Fuller v. Town of Vevay,* 713 N.E.2d 318, 322 (Ind. App. 1999); *Agmax, Inc. v. Countrymark Cooperative, Inc.,* 795 F.Supp. 888, 891 (S.D. Ind. 1992). Accordingly, one of

the elements that must be shown for the maintenance of an anti-trust or restraint-of-trade claim federally and at Indiana law is antitrust injury or competitive harm. Because the plaintiffs candidly admit that they cannot show this competitive harm element, (Plaintiffs' Response, p. 31-32), their statutory restraint-of-trade claim is doomed.

At common law, Indiana courts have upheld covenants not to compete against common-law restraint-of-trade claims, particularly in the context of sales of a business. *See, e.g., Fogle v. Shah,* 539 N.E.2d 500 (Ind. App. 1989). The plaintiffs concede that "[i]t is true that the RBC-Bank One agreement that is at issue in this case is a form of a covenant not to compete," (Plaintiffs' Response, p. 33), but they assert that the law respecting such covenants do not apply to them because they did not consent to the Agreement; the Agreement is between only RBC and Bank One and only they are bound by the covenants. The plaintiffs' argument is futile. Under Indiana law, three factors are examined in evaluating the enforceability of a covenant not to compete:

> (a) whether the covenant is broader than necessary for the protection of the covenantee . . . in some legitimate interest, (b) the effect of the covenant upon the covenantor, . . . and (c) the effect of the covenant upon the public interest. Of primary importance is the question of . . . whether it is reasonable as to time, space and the activity restricted.

Fogle, 539 N.E.2d at 503. Thus, the effect on the public interest of restricting an individual's ability to freely compete with his services is part of the analysis of the legality of covenants under Indiana's common law and Indiana courts have decided that, in some instances, particularly in the context of sales of businesses, the public interest permits restrictions on individuals' rights to market their services and companies' rights to freely hire. If Bank One hired the plaintiffs in contravention of the Agreement's no-hire provision, and the covenant were held enforceable at law, then RBC would be able to enforce the provision against Bank One, preventing its hire of the plaintiffs, regardless of the plaintiffs' desire to freely market their services or to be employed by Bank One.

The defendants contend that the no-hire provision is an enforceable covenant under Indiana common law based on the *Fogle* test and cite persuasive authority in support. The plaintiffs attempt no showing or argument on the *Fogle* factors and do not even suggest that the Bank One-RBC no-hire provision is unreasonable as to time, place, or manner. The plaintiffs' sole argument on their common law restraint-of-trade claim was legal: that Indiana's doctrine that properly-limited non-compete covenants do not illegally restrain trade does not apply to the Bank One-RBC Agreement. Having found against them on this point, the Court concludes that the plaintiffs have not shown that their common-law restraint-of-trade claims can be sustained.

Conclusion.

There is no genuine issue of fact that is material to the plaintiffs' claims and the defendants have shown that they are due judgment as a matter of law on all of the plaintiffs' claims. Therefore, the defendants' motion for summary judgment is **GRANTED** and the plaintiffs' cross-motion for summary judgment is **DENIED**. A separate judgment order will issue.

IT IS SO ORDERED.

Date: 09/30/2005

/s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

ELIZABETH DEICH-KEIBLER and LARRY K. HALER,	) **CAUSE NO.**) **4:04-CV-00005-SEB-WGH**
Plaintiffs,	)
vs.	)
BANK ONE and RBC MORTGAGE COMPANY,	)
Defendants.	)

JUDGMENT

The Court, having issued its Entry on the parties' cross-motions for summary judgment this date, hereby,

ORDERS, **ADJUDGES**, and **DECREES** judgment in favor of the defendants and against the plaintiffs on all of the plaintiffs' claims.

IT IS SO ORDERED.

Date: 09/30/2005

/s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

ELIZABETH DEICH-KEIBLER and LARRY K. HALER,	)	
Plaintiffs,	)	
vs.	)	4:04-CV-00005-SEB-WGH
BANK ONE and RBC MORTGAGE COMPANY,	)	
Defendants.	)	

ENTRY DENYING PLAINTIFFS' MOTION TO SET ASIDE JUDGMENT AND DENYING DEFENDANTS' MOTION FOR ATTORNEY FEES AND AN AWARD OF COSTS AGAINST PLAINTIFFS

This Cause comes before the Court on the Motion to Set Aside Judgment [Docket No. 60] filed by Plaintiffs, Elizabeth Deich-Keibler and Larry K. Haler, pursuant to Fed. R. Civ. P. 59(e). Because we find that Plaintiffs' request does not conform to the requirements of Rule 59(e), we hereby DENY Plaintiffs' Motion.

In addition, regarding Defendants' Motion for Attorney Fees and Costs [Docket No. 64], we hereby DENY Defendants' Motion and hold that each party

shall bear its own attorneys' fees and costs in this cause.

Plaintiffs' Motion to Set Aside Judgment

Plaintiffs' Motion requests that this court set aside its Judgment of September 30, 2005, pursuant to Rule 59(e). In our order of that date, we granted Defendants' Motion for Summary Judgment and denied Plaintiffs' Cross-Motion for Summary Judgment pertaining to various ERISA, Indiana statutory, and Indiana common-law claims against Defendants.

Rule 59(e) provides a procedural mechanism by which an aggrieved party may seek to alter or amend a previous judgment. Courts have broad discretion in determining whether to grant such motions. *See In re Prince,* 85 F.3d 314, 324 (7th Cir. 1996), *cert. denied,* 519 U.S. 1040 (1996) ("The decision whether to grant or deny a Rule 59(e) motion is entrusted to the sound judgment of the district court[.]"). Rule 59(e) is *not* intended as a means by which a disappointed party may acquire "another bite at the apple" – that is, it is not merely a tool by which a party may simply "rehash[] old arguments." *Oto v. Metropolitan Life Ins.* Co., 224 F.3d 601, 606 (7th Cir. 2000). The Seventh Circuit has held that "there are only three valid grounds for a Rule 59(e) motion – newly-discovered evidence, an intervening change in the law, and manifest error in law[.]" *Cato v. Thompson,* 118 Fed.Appx. 93, 96 (7th Cir. 2004). "Manifest error" consists of the "wholesale disregard, misapplication,

or failure to recognize controlling precedent." *Oto*, 224 F.3d at 606.

Plaintiffs contend that we "should seriously consider granting a motion such as this based upon the simple standard of error." Pls.' Mem. at 1. However, as stated above, this is clearly not a basis for relief under Rule 59(e). Plaintiffs further state that "the Court's error in dismissing these claims was quite manifest," *id.* at 2; however, Plaintiffs' Memorandum in support of their motion amounts to nothing more than a restatement of their previous arguments. This will not suffice in terms of securing post-judgment review. Plaintiffs in any event have failed to demonstrate manifest error in the Court's judgment. As Defendants correctly state, "A 'manifest error' is not simply . . . where the Court rules against the moving party." Defs.' Mem. at 2. Therefore, Plaintiffs' Motion to Set Aside this Court's judgment based on Rule 59(e) is hereby DENIED.

Defendants' Motion for Attorney Fees and Costs

Defendants seek a ruling whereby their attorney fees and costs in the above Cause would be shifted to Plaintiffs, given the Court's determination that Plaintiffs' lawsuit lacked legal merit. The amount of the award Defendants seek is $22,054.94. This total reflects $18,747.20 in attorneys' fees, $890.43 in computerized legal research charges, and $2,417.31 in statutory costs. Defs.' Mem. at 6. Defendants' request is based on Section 502(g) of ERISA – 29

U.S.C. § 1132(g) – which provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

In *Hooper v. Demco,* 37 F.3d 287, 294 (7th Cir. 1994), the Seventh Circuit stated that "the bottom-line question" in determining whether to award attorneys' fees and costs is: "was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?" *Id.* A position is "substantially justified" if it is "something more than nonfrivolous, but something less than meritorious." *Stark v. PPM America, Inc.,* 354 F.3d 666, 673 (7th Cir. 2004).

Plaintiffs' arguments in this Cause, though not ultimately successful, were not frivolous; in our view, they were "substantially justified," at least for purposes of this issue of fees and costs assessments. We find no evidence indicating that Plaintiffs' arguments were made in bad faith. The Seventh Circuit has stated that "ERISA's remedial purpose is to protect, rather than penalize participants who seek to enforce their statutory rights[.]" *Stark,* 354 F.3d at 673. Accordingly, we hold that each party shall bear its own attorneys' fees and costs, and hereby DENY Defendants' Motion for Attorney Fees and Costs.[1]

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[1] Because we so hold, we need not address the parties' filings with respect to the particulars of the Bill of Costs submitted by the Defendants (Docket Nos. 66, 67, 70, 71).

Conclusion

For the reasons set forth above, Plaintiffs' Motion to Set Aside Judgment is hereby DENIED. Defendants' Motion for Attorney Fees and Costs is also DENIED. IT IS SO ORDERED.

Date: 09/19/2006

/s/ Sarah Evans Barker
SARAN EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Copies to:

Samuel G. Hayward
ADAMS HAYWARD & WELSH
samuelghayward@hotmail.com

Dustin E. Meek
TACHAU MADDOX HOVIOUS & DICKENS, PLC
dmeek@tmhd.com

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 27, 2007

Before

Hon. FRANK H. EASTERBROOK, *Chief Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DIANE S, SYKES, *Circuit Judge*

No. 06-3802

ELIZABETH DEICH-KEIBLER, and LARRY K. HALER,

Plaintiffs-Appellants,

v.

BANK ONE and RBC MORTGAGE COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, New Albany Division.

No. 04 C 5

Sarah Evans Barker, *Judge.*

ORDER

Upon consideration of Appellant's petition for rehearing en banc, filed on June 26, 2007, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition.* Accordingly,

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* Judge Rovner took no part in the consideration or decision of the petition for rehearing.

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
AT NEW ALBANY
NO. 4:04-CV-5 SEB-WGH

ELIZABETH DEICH-KEIBLER AND LARRY K HALER **PLAINTIFFS**

versus

NOTICE OF APPEAL

(Filed Oct. 17, 2006)

BANK ONE and RBC MORTGAGE COMPANY **DEFENDANTS**

* * *

Notice is hereby given that Elizabeth Deich-Keibler and Larry K. Haler, Plaintiffs in the above named case, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on the 30th day of September, 2005, as made final and appealable by the Order denying the Plaintiffs motion to set it aside, pursuant to FRCP 59(e), entered in this action on September 20, 2006.

The Plaintiffs are also appealing from the Order of September 20, 2006.

/s/ Samuel G. Hayward
SAMUEL G. HAYWARD
ADAMS, HAYWARD & WELSH
4036 Preston Highway
Louisville, Kentucky 40213
Tel: (502) 366-6456

/s/ Philip C. Kimball
PHILIP C. KIMBALL
1970 Douglass Boulevard
Louisville, Kentucky 40205
Tel: (502) 454-4479

CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy of this pleading upon Dustin E Meek, Esq., 2700 National City Tower, 101 South 5th Street, Louisville, KY 40202-3116, by mailing her the same to her upon this 17th day of October, 2006.

/s/ Samuel G. Hayward
SAMUEL G. HAYWARD